From: TIM BARTLEMAN
To: Microsoft ATR
Date: 1/21/02 2:56pm
Subject: Microsoft anti-trust

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January 21, 2002

Hon. Colleen Kollar-Kotelly
U.S. District Court, District of Columbia
c/o Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Dear Judge Kollar-Kotally:

The proposed settlement between the Department of Justice and Microsoft in *U.S. v. Microsoft* falls far short of what is needed to put an end Microsoft's pattern of predatory practices.

This deal does not adequately protect competition and innovation in this vital sector of our economy, does not go far enough to address consumer choice, and fails to meet the standards for a remedy set in the unanimous ruling against Microsoft by the Court of Appeals for the District of Columbia. Its enforcement provisions are vague and unenforceable. The five-year time frame of the proposed settlement is much too short to deal with the antitrust abuses of a company that has maintained and expanded its monopoly power through fear and intimidation.

Microsoft's liability under the antitrust laws is no longer open for debate. Microsoft has been found liable before the District Court, lost its appeal to the United States Court of Appeals for the District of Columbia in a 7-0 decision, saw its petition for rehearing in the appellate court denied, and had its appeal to the Supreme Court turned down. The courts have decided that Microsoft possesses monopoly power and has used that power unlawfully to protect its monopoly.

The next step is to find a remedy that meets the appellate court's standard to "terminate the monopoly, deny to Microsoft the fruits of its past statutory violations, and prevent any future anticompetitive activity." This proposed settlement fails to do so.

The Deal Fails to Meet the Appellate Court's Remedy Standards

This proposed settlement clearly fails to meet the standards clearly laid out by the appellate court. In fact, the weak settlement between Microsoft and the Department of Justice ignores key aspects of the Court of Appeals ruling against Microsoft. Here are several examples of where this weak settlement falls short:

1) The settlement does not address key Microsoft practices found to be illegal by the appellate court, such as the finding that Microsoft's practice of bolting

applications to Windows through the practice of "commingling code" was a violation of antitrust law. This was considered by many to be among the most significant violations of the law, but the settlement does not mention it.

2) The settlement abandons the principle that fueled consumer criticism and which gave rise to this antitrust case in 1998: Microsoft's decision to bind – or "bolt" – Internet Explorer to the Windows operating system in order to crush its browser competitor Netscape. This settlement gives Microsoft "sole discretion" to unilaterally determine that other products or services which don't have anything to do with operating a computer are nevertheless part of a "Windows Operating System product." This creates a new exemption from parts of antitrust law for Microsoft and would leave Microsoft free to bolt financial services, cable television, or the Internet itself into Windows.

3) The deal fails to terminate the Microsoft monopoly, and instead guarantees Microsoft's monopoly will survive and be allowed to expand into new markets.

4) The flawed settlement empowers Microsoft to retaliate against would-be competitors and to take the intellectual property of competitors doing business with Microsoft.

5) The proposed settlement permits Microsoft to define many key terms, which is unprecedented in any law enforcement proceeding.

Loopholes Undermine Strong-Sounding Provisions

The proposed settlement shows that it contains far too many strong-sounding provisions that are riddled with loopholes. Here are several examples:

- The agreement requires Microsoft to share certain technical information with other companies in order for non-Microsoft software to work as intended. However, Microsoft is under no obligation to share information if that disclosure would harm the company's security or software licensing. Who gets to decide whether such harm might occur? Microsoft.

- The settlement says that Microsoft "shall not enter into any agreement" to pay a software vendor not to develop or distribute software that would compete with Microsoft's products. However, another provision permits those payments and deals when they are "reasonably necessary." The ultimate arbiter of when these deals would be "reasonably necessary?" Microsoft.

The settlement does nothing to deal with the effects on consumers and businesses of technologies such as Microsoft's Passport. Passport has been the subject of numerous privacy and security complaints by national consumer organizations. However, corporations and governments that place a high value on system security will be unable to

benefit from competitive security technologies, even if those technologies are superior to Microsoft's. Why? Microsoft controls their choices through its monopolies and dominant market share, and still is able to dictate what technologies it will include.

Enforcement

The weak enforcement provisions in this proposed deal leave Microsoft free to do practically whatever it wants.

A three-person technical committee will be appointed, which Microsoft appointing one member, the Department of Justice appointing another, and the two sides agreeing on the third. This means that Microsoft gets to appoint half of the members of the group watching over its actions.

The committee is supposed to identify violations of the agreement. But even if the committee finds violations, the work of that committee cannot be admitted into court in any enforcement proceeding. This is like allowing a football referee to throw as many penalty flags as he likes for flagrant violations on the field, but prohibiting him from marching off any penalties.

Finally, Microsoft must comply with the lenient restrictions in the agreement for only five years. This is not long enough for a company found guilty of violating antitrust law.

The Proposed Settlement fails to Adequately Address Consumer Needs

The settlement does not go far enough to provide greater consumer choice, and leaves Microsoft in a position that it can continue to charge whatever it wants for its products.

As a recent *Chicago Tribune* story said: "If you believe that what's good for Microsoft Corp. is good for consumers, the proposed settlement of the software giant's three-year federal antitrust battle is cause for celebration. If you believe that consumers would benefit more if Microsoft could no longer use its Windows monopoly as a springboard into new markets, you stand to be sorely disappointed."

In addition, consumer groups have opposed the settlement. Mark Cooper, director of research for the Consumer Federation of America, said: "Wall Street's view is that Microsoft's business model doesn't change. If that's the case, we will continue to be afflicted with the same anti-competitive behavior."

Analysts Conclude that Deal Will Not Affect Microsoft's Practices

Sadly, the proposed final judgment by Microsoft and the Department of Justice has the potential make the competitive landscape of the software industry worse, contains so many ambiguities and loopholes that it may be unenforceable, and is likely to lead to years of additional litigation.

Analysts of all kinds have indicated that the weak settlement will not impact Microsoft or its illegal practices. Following are a variety of examples:

"As we have stated before, we believe a settlement is a best case scenario for Microsoft. And, this settlement in particular seems like a win for Microsoft being that it would preserve Microsoft's ability to bundle its Internet assets with Windows XP and future operating systems – a plus for the company. In fact, it appears that Internet assets such as Passport are untouched. Also, as is typical with legal judgments, this settlement is backward looking, not forward looking. In other words, it looks at processes in the past, but not potential development of the future." **Morgan Stanley, 11/02/01**

"The deal ... appears to be 'more, better, and faster' than we expected in a settlement deal between Microsoft and DoJ. The deal will apparently require few if any changes in Windows XP and leave important aspects of Microsoft's market power intact." **Prudential Financial, 11/01/01**

"With a dramatic win last week, Microsoft appears to be on its way to putting the U.S. antitrust case behind it. The PFJ between the Department of Justice and Microsoft gives little for Microsoft's competitors to cheer about. ... There is very little chance that competitors could prove or win effective relief from violation of this agreement, in our view." **Schwab Capital Markets, 11/6/01**

"This is a spectacular victory for Microsoft.'"
- David Yoffie, professor, Harvard Business School, *New York Times* 11/02/01

"This deal appears to fall far short of what could have been obtained in court, and what's necessary to protect the public."
- Andrew Schwartzman, public interest firm lawyer, Media Access Project, *Wall Street Journal* 11/02/01

"[The settlement] fails to protect competition in the software industry and does not come close to dealing with the problems that were found to exist by the District Court and the Court of Appeals."
- Albert A. Foer, president, American Antitrust Institute, *Washington Post* 11/05/01

"This is a reward, not a remedy."
- Kelly Jo MacArthur, general counsel, RealNetworks, Inc., *Globe and Mail* 11/08/01

"It looks like the government is giving them a slap on the wrist. I find that sad. It won't achieve any of the goals of the proceeding."
- Robert Lande, law professor and antitrust expert, University of Baltimore, ZDWire 11/07/01

The strength of any remedy is particularly important given Microsoft's growing dominance in the software markets. Since the end of the trial in the District Court, Microsoft's monopolies are stronger in each of its core markets with both the Windows

operating system and the Office suite now higher than 92 percent and 95 percent, respectively. In addition, Microsoft has achieved a monopoly in web browsers, and has seen competitors such as the Linux operating system fade.

The Microsoft Monopoly Should not be Exempt from Antitrust Laws

Enforcing federal antitrust laws against monopolies is not new or novel. Antitrust law has protected free markets and enhanced consumer welfare in this country for more than a century. The Microsoft case does not represent a novel application of the law, but is the kind of standard antitrust enforcement action necessary to insure vigorous competition in all sectors of today's economy.

These same standards have been applied to monopolies in the past. We do not have one oil company determining how much we pay for gasoline, but instead we have suppliers such as Exxon, Mobil, Amoco and Chevron competing with each other. These companies were all part of the Standard Oil monopoly, which was dissolved because Standard Oil was found to have violated the antitrust laws.

Less than 20 years ago, the nation essentially had one telephone company – AT&T. After the government sued AT&T for violating the antitrust laws, the company was broken up, and competition was introduced in the long distance business. Since competition was introduced into that market, real prices have declined more than 70 percent, and there has been more innovation in the past two decades than in most of the preceding century.

Settlement is Based on Flawed Economic Assumption, and Sets a Bad Precedent

Some defenders of the proposed settlement between Microsoft and the DOJ have adopted the view that settling this case could somehow revive the slowing U.S. economy. Their motives are good, but their reasoning is flawed. What economic theory holds that protecting monopolies is better for stimulating the economy that promoting competition?

In addition, this case will set an important precedent. Former Judge Robert H. Bork has noted that:

"In settling the most important antitrust case in decades through a remedy that will have not impact on the current or future competitive landscape, and absolutely no deterrent effect on the defendant, the Department of Justice has effectively repealed a major segment of the nation's antitrust laws. Moreover, any potential witness with knowledge of anticompetitive conduct in a monopolized market has to weigh the potential benefit of his or her testimony against the likely response of the defendant monopolist. The DOJ's proposed meaningless remedy would insure that no witness would ever testify against Microsoft in any future enforcement action."

Conclusion

The end result is that this proposed settlement allows Microsoft to preserve and reinforce its monopoly, while also freeing Microsoft to use anticompetitive tactics to spread its dominance into other markets.

After more than 11 years of litigation and investigation against Microsoft, surely we can – and we must – do much better than this flawed proposed settlement between the company and the Department of Justice.

Thank you for your time.

Regards,

Tim Bartleman